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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1944

No. 142

LELAND H. CAMERON,
Petitioner,

vs.

CIVIL AERONAUTICS BOARD,
Respondent.

Reply Brief.

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The Petitioner is properly in this Court.

The primary purpose of the Civil Aeronautics Board is that of avoiding the issues presented by petitioner. Great weight is placed upon the fact that petitioner waived his right to a hearing (Respondent's Brief, 9); and that he did not move for reconsideration of the Board's order, which would have given the Board an opportunity to avoid some of the ineffectiveness of its record (Respondent's Brief, 10). Injustice is not justified by failure to make use of a motion for reconsideration, which would obviously have been futile. A remedy of review by the Circuit Court of Appeals is expressly provided by statute (U. S. Code, Title 49, sec. 646), and, in this case, the objection to penalizing the petitioner was urged before the Board upon the only grounds that could have met the charges before that

Board. Paragraph (e) of section 646 does not require that there be a motion for a rehearing or reconsideration before relief may be sought in the Court as authorized in paragraph (a) of the same section. Petitioner had submitted all evidence upon which the charges against him may be defeated, and was to gain nothing by a motion for reconsideration. The Board's position is that on a reconsideration it might have made a better case against the petitioner. The Board itself recognizes that there is no duty on its part to entertain a motion for reconsideration in this case and no right in petitioner to seek such reconsideration (Respondent's Brief, 9, note 5). The petitioner exhausted his administrative remedy, so far as he had such a remedy; and the Civil Aeronautics Board had, by its rules, given him no additional remedy. He had a right to seek judicial review.

The issues are properly before this Court.

The issues of this case relate to (1) army flying and (2) substantial evidence. It is now contended that such issues were not properly preserved. Such contention was not made in the Circuit Court of Appeals.

The order of the Board was that petitioner be suspended and all that appears in the record on behalf of petitioner may be regarded as an objection to the entry of such an order. And there can be no doubt of the duty of the Board to weigh the evidence that appears in the record of this case without motion on the part of petitioner that the Board act only on substantial evidence.

The complaint presented to the Civil Aeronautics Board by the Civil Aeronautics Administration charges improper piloting while flying army aircraft (R. 32), and the order restricting petitioner's license makes the same finding (R. 2-3). A substantial portion of the record, analysed on pages 10 to 12 of petitioner's original brief, relates to the

fact that he was engaged in army flying. Petitioner's statement of specific instructions with respect to the particular type of army airplane appears in the record (R. 11), as does his superior officer's statement that flights of this character required deviation from the standard procedure (R. 21).

But counsel for the Civil Aeronautics Board say that this issue was not presented to the Board (Respondent's Brief, 9), and that petitioner's attorney at no time made such a contention before the Board, although he by letter raised the issue before the Board (Respondent's Brief, 9-10, note 7). With oral hearing waived, it must be a military secret as to how the issue could have been raised otherwise than in writing, and as to why raising it in writing would not suffice, although the only available method. But Respondent further alleges that a claim that petitioner was flying "under the direction and control and pursuant to the orders of the Army" did not raise the issue of possible deviation of such army orders (Respondent's Brief, pp. 9-10, note 7), although this was the only possible reason for such claim; and although at the time the claim was made, the Board had before it evidence of deviation which petitioner had been authorized to make in Army flights (R. 13, 21), and which had been presented in defense of petitioner.

With respect to substantial evidence, the Courts have authority, and the question here is not one as to whether the inspector's and comptroller's reports (R. 27, 30) should have been considered by the Civil Aeronautics Board, but rather one as to whether they, as the sole evidence against petitioner, constitute substantial evidence of his guilt. Respondent contends that petitioner may not claim an absence of substantial evidence unless he specifically denied the substantial character of each piece of opposing evidence before the Board, although he could not know in advance

of the order whether substantial evidence would be found by the Board.

The issue of substantial evidence is one to be presented to the Court, and not to a Board which from alleged evidence before it has already determined guilt of what the Board's counsel below termed "almost criminal" conduct. And the issue here, while relating only to two official reports, also relates to the only evidence in this record which is relied upon as substantial evidence against petitioner and which must be relied upon to support the order. The issue is not merely one as to two reports, but as to whether they constitute substantial evidence sufficient to support the order.

The Civil Aeronautics Board had full opportunity to consider on their merits the questions of army flying, and of substantial evidence to sustain its order; and there is a statutory duty not to make findings unsupported by substantial evidence. The Board was fully apprised of the questions at issue, and no difficulty presents itself as in *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U. S. 253, 256. And where a final order has been entered, and there is no right to seek or to obtain a reconsideration, it is not necessary to seek reconsideration by the Board in order to relitigate before it the Board's finding on what it has necessarily determined to have been based on substantial evidence.

The Petitioner was flying in accordance with army instructions.

Upon this matter, Respondent bases its argument on the claim that in petitioner's army flying no deviation was permitted from civil rules. The record shows that deviations had been required of him in army test flying (R. 13, 21) which had involved 1300 hours in the air (R. 12), and that the flight here involved was such a test flight (R. 23). And

nothing in the record contradicts or seeks to contradict petitioner's statement that he had and observed specific instructions regarding the type of army plane which he was flying in the test flight on January 20, 1943 (R. 10, 11, 12).

Respondent says that "there is nothing in the record to indicate that petitioner was directed or required by military rules or orders to fly in such a manner as to violate the Air Traffic Rules of the Civil Aeronautics Board" (Respondent's Brief, 10); and the court below said that "Army orders were to fly according to contact flight rules in accordance with Civil Air Regulations" (R. 38).

Respondent further misstates the question here at issue as one regarding the power of the Civil Aeronautics Board to suspend an army pilot flying an army plane who, "without specific authorization or directions from his superior officers," violates Civil Air Regulations "which are substantively identical" with army regulations (Respondent's Brief, 2). Here, as elsewhere, Respondent states issues upon an assumption that all facts are in its favor, and in disregard of the record in this case. In this instance Respondent assumes identity of regulations, and absence of any instructions for deviation.

While there is no admission that petitioner landed in the manner charged in the complaint, this record may show some deviation from the Air Traffic Rules, although there is substantial uniformity between the civil and army rules. Respondent contends that no deviations had been authorized, and that the directions to proceed "at C F R (Altitude)," denoting "Contact Flight Rules," gave instructions not to deviate (Respondent's Brief, 11-12), although use of a civil standard form might well be made as to an army plane without implying such instructions and may readily have been accompanied by instructions to deviate in flying the particular type of plane.

With respect to army flights by the petitioner, the record does not agree with statements of Respondent and of the lower court, and the question presents itself as to which is controlling. Petitioner's superior officer said that petitioner's flights necessitated "deviation from the standard procedure" (R. 21); and a Signal Corps observer who was with him stated that test flights by petitioner "demanded flying of an unusual nature" (R. 13). Unquestionably, deviation by petitioner had previously been authorized or ordered in a number of cases involving 1300 hours of test flying (R. 12). Petitioner stated specifically that he had deviating and supplementary instructions for the type of army plane which he was flying (R. 10, 11; Petition, 11), and this statement is uncontradicted.

There is nothing in the record contradicting petitioner's statement as to specific instructions in the present case, or his superior's statement as to necessary deviations in his other flights, unless such statements are contradicted by the admitted existence of uniform standards in the absence of deviation. Respondent takes the position that such uniformity establishes the "absence of any conflict between military orders and civil obligations" (Respondent's Brief, 14), directly contradicting statements of petitioner and of his superior as to necessary deviations; and Respondent supports this by introducing into this case a letter from the Acting Air Judge Advocate, dated June 14, 1944, based apparently upon a request so couched as to support Respondent's position (Respondent's Brief, 28-29).

The Opinion of the lower Court is not supported by Substantial Evidence.

The petition for certiorari calls attention to the fact that, to prove the charge against petitioner, certain specific acts must be proved, and that certain essential acts are not

proved, even if all alleged evidence be construed as proper (Petition, 8-9, 17-18). Respondent avoids any reply to this issue, which in itself is controlling in this case.

Respondent relies upon the Dillon and Hamilton reports as the sole basis for proof of the complaint against petitioner, and neither of these reports covers all matters necessary to establish such complaint; nor do the two considered together cover all such matters. This subject is sufficiently covered in the brief accompanying the Petition for Certiorari (Petition 8-9; 17-18).

But even if these reports had covered all matters necessary to be proved, there is absence of substantial evidence. Irrespective of the opinion of the Circuit Court of Appeals, the Dillon report neither directly nor impliedly indicates that he was an eye-witness. It rather indicates that it is a report based upon a statement to Dillon by some other person. Such a report is not evidence. This is sufficiently covered in the Petition, page 16.

The Hamilton report specifies that he personally observed two flights within one week of each other, one of which did not occur (R. 29; Petition, 16). Respondent claims that the accuracy of his one statement is reinforced by the falsity of the other, and the reinforcement claimed is that of the charge supported by Hamilton's statement (Respondent's Brief, 17).

The issue here is not one as to the weight of the evidence but is rather one as to the existence of substantial evidence. This is not a matter of expert evidence or expert judgment. This Court is equally as competent as the Civil Aeronautics Board to determine (1) whether essential matters in the complaint are supported by any evidence; (2) whether a written statement is to be impliedly construed as that of an eye-witness; and (3) whether part of a statement is to be treated as substantial evidence, when another part, charging a more serious offense just one

week previously, is found to be false, although the party making the statement bases his report on personal observation.

Conclusion.

This petition for certiorari should be granted and the order of the Civil Aeronautics Board set aside on the grounds that:

(1) Petitioner was piloting for the army under deviating instructions shown in the record; and is not restrained from continuance of such piloting, except by the threat of a further penalty if in such future piloting he continues to follow deviating army orders;

(2) There is no evidence as to essential elements in the complaint, proof of which was necessary to sustain the complaint;

(3) There is no substantial evidence as to any elements of the complaint.

Respectfully submitted,

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